

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the  
Commission's Own Motion into Competition for  
Local Exchange Service.

Rulemaking 95-04-043  
(Filed April 26, 1995)

Order Instituting Investigation on the  
Commission's Own Motion into Competition for  
Local Exchange Service.

Investigation 95-04-044  
(Filed April 26, 1995)

**ADMINISTRATIVE LAW JUDGE'S RULING  
INITIATING NEW PHASE TO ADDRESS FCC ORDER  
ON UNBUNDLED SWITCHING ELEMENT PLATFORM**

**I. Introduction**

This ruling initiates a new phase within the Local Competition Rulemaking/Investigation (R. 95-04-043/I. 95-04-044) for the purpose of conducting proceedings in response to a Federal Communications Commission (FCC) Order that was adopted on February 20, 2003 concerning incumbent local exchange carriers (ILECs') obligations to make elements of their networks available on an unbundled basis to new entrants. Although the text of the FCC Order has not yet been publicly issued, the FCC has announced the major substantive results reached therein and the additional steps that will be required, including responsibilities delegated to the states.

Among other things, the FCC Order makes findings concerning switching, which is a key element of what is known as the "unbundled network element

platform” (UNE-P). The FCC Order finds that switching utilized by business customers served by high capacity loops such as DS-1, will no longer be unbundled based on a presumptive finding that such action causes no impairment to competing carriers. The FCC Order thus presumes that competing carriers will face no impairment in terms of market entry or ability to compete due to lack of access to the high capacity loops switching UNE.

Under the framework adopted in the FCC Order, the states are delegated the role of considering rebuttals to the FCC’s finding that presumes no impairment. Specifically, the FCC Order provides states with a 90-day time limit within which to determine whether the “no impairment” presumption has been rebutted with respect to the switching UNE specifically for business customers served by high capacity loops such as DS-1. In the event that the finding of “no impairment” is upheld, the FCC sets forth a 3-year period for carriers to transition off of UNE-P.

The FCC separately provides the states with a 9-month time limit within which to determine the effects of no longer unbundling the switching element as it relates to mass market customers. With respect to mass market customers, the FCC Order sets forth specific criteria that the states will apply to determine, on a granular basis, whether operational and economic impairment exists in particular markets. The procedural process for evaluating the effects on mass market customers shall be developed in a separate phase.

This ruling is issued specifically to initiate a process to provide parties an opportunity to rebut the “no impairment” presumption as called for under the 90-day limit set by the FCC Order. We will assume that the 90-day time period for the states to rebut the presumption of “no impairment” begins to run at the point of issuance of the FCC Order which is anticipated shortly. A specific

procedural schedule for this phase shall be issued once the FCC Order becomes publicly available. This ruling, however, provides the opportunity to begin preliminary development of a procedural plan. Accordingly, comments are solicited from parties, as directed below. This phase of the proceeding addresses only the process for rebutting the presumption of “no impairment” under the 90-day schedule with respect to business customers served by high capacity loops such as DS-1.

## **II. Burden of Proof**

Since the FCC Order finds a presumption of “no impairment,” the burden of proof in this proceeding shall be on those parties seeking to rebut this presumption.

## **III. Initiation of Discovery**

Even though the FCC Order has not yet been made publicly available, parties should not delay initiating any necessary discovery in connection with this phase of the proceeding. To the extent that parties already have in mind the sort of evidence they intend to offer in support of a rebuttal to the presumption of “no impairment,” they should proceed immediately to formulate discovery needs and to exchange data requests and responses, as necessary. To the extent any discovery disputes arise that cannot be resolved between the parties on a meet-and-confer basis, parties should promptly bring such disputes to the Commission by filing an appropriate motion to compel in accordance with applicable law and motion procedures.

## **IV. Comments on Scope of Issues and Scheduling Process**

### **A. Identification of Active Parties**

This ruling provides notice and opportunity for those parties that intend to participate actively in this phase of the proceeding to identify

themselves. In particular, any party that seeks to rebut the presumption of “no impairment” with respect to business customers served by high capacity loops such as DS-1 is directed to file a response to this ruling identifying themselves, their interests in the proceeding, and their planned extent of participation in this phase of the proceeding.

**B. 90-Day Schedule Apportionment**

As noted above, only a 90-day time frame is allotted by the FCC Order for any state to issue an order finding that the FCC presumption of no impairment has been rebutted. In view of the limited time allotted by the FCC, parties are directed to file comments concerning the scope of issues they intend to raise. Parties shall also present proposals as to apportionment of the limited 90-day period to provide for all necessary steps leading to a timely Commission decision, including discovery, filing of comments (or testimony), briefing, and Commission deliberation as to whether the “no impairment” presumption has been rebutted.

**C. Need for Evidentiary Hearings**

Parties shall indicate whether they believe evidentiary hearings are required to develop the necessary record for this phase of the proceeding. Any party requesting evidentiary hearings shall identify the material factual issues in dispute that they believe warrant such hearings. Since the actual text of the FCC Order has not yet been made available publicly, parties obviously may not be able to address the precise level of issues that may become apparent after the FCC Order is publicly released. Nonetheless, parties should already have an idea of the nature and extent of evidence entailed in rebutting the presumption of no impairment, and should be as complete as possible in their comments as to scope in response to this ruling.

#### **D. Alternatives to Evidentiary Hearings**

Under the Commission's Rules of Practice and Procedure, proceedings involving evidentiary hearings require a longer processing time than proceedings that involve only written pleadings. Thus, if evidentiary hearings are held, completion of this proceeding within the 90-day limit required by the FCC Order will be a greater challenge. To the extent parties can suggest ways to shorten the time required for any evidentiary hearings, or to develop the necessary record through means other than evidentiary hearings, they are encouraged to do so in comments in response to this ruling. For example, parties should address the extent to which depositions or stipulated written admissions of fact may be used as a means of developing a record in lieu of, or as a supplement to, evidentiary hearings. It is anticipated that even if evidentiary hearings are not held, there will be at least one opportunity for a full panel hearing before the Commission or an all-party meeting prior to final Commission action on this matter.

After receipt and review of comments, a subsequent ruling will be issued addressing more specifically the procedural plan that will be adopted for this phase of the proceeding.

#### **V. Ex Parte Requirements**

For purposes of this phase of the proceeding only, the ex parte rules set forth in the Commission's Rules of Practice and Procedure in Article 2.5, Rule 7 (c) shall apply. Article 2.5 states that it applies to proceedings filed after January 1, 1998. Although this proceeding was technically filed prior to January 1, 1998, it is appropriate to apply the Article 2.5 ex parte rules here since this phase of the proceeding is being initiated to address a new matter. Rule 7(c),

which applies to ratesetting procedures, permits ex parte communications, but provides appropriate restrictions to ensure that all parties' rights are protected.

The ex parte rules previously in effect for other phases of the Local Competition rulemaking/investigation shall remain unchanged and are not impacted by the ex parte rules adopted for this limited phase of the proceeding.

## **VI. Service of this Ruling**

In the interests of assuring that all potential parties that may have an interest in this phase of the proceeding are given notice and opportunity to comment, in addition to regular service, a copy of this ruling shall also be served on all certificated telecommunications carriers within California. As an additional measure, the ruling shall be served on the service lists in the two major UNE proceedings before the Commission. These two proceedings are in Application (A.) 01-02-024 (for SBC Pacific) and the Verizon UNE phase of R.93-04-043.

### **IT IS RULED that:**

1. A separate phase of the Local Competition proceeding is hereby initiated to provide a process for parties to rebut the FCC's presumption of "no impairment" to competing carriers as a result of discontinuance of the switching unbundled network element (UNE) utilized by business customers served by high capacity loops such as DS-1.
2. Comments are hereby solicited from parties addressing the matters outlined in the discussion portion of this ruling as a basis to begin development of the procedural process for interested parties to rebut the presumption of "no impairment" as outlined above.

3. Opening comments in response to this ruling shall be filed and served on August 18, 2003 and reply comments shall be filed and served on August 25, 2003.

4. In addition to regular service, a copy of this ruling shall also be served on all active certificated telecommunications carriers within California, as well as on parties on the service lists in A.01-02-024 (for SBC Pacific) and the Verizon UNE phase of R.93-04-043.

5. The ex parte requirements in Rule 7.c of the Commission's Rules shall apply to this phase of the proceeding.

6. Further notice of scheduling and process for this phase of the proceeding shall be issued by ruling following receipt of comments and public release of the FCC Order.

Dated July 31, 2003, at San Francisco, California.

/s/ Thomas R. Pulsifer  
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Thomas R. Pulsifer  
Administrative Law Judge

## CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Initiating New Phase to Address FCC Order on Unbundled Switching Element Platform on all parties of record in Application 01-02-024, the service list for the Verizon UNE Phase of Rulemaking 93-04-043, and on the service list of California certificated Telco carriers in this proceeding or their attorneys of record.

Dated July 31, 2003, at San Francisco, California.

/s/ Antonina V. Swansen

Antonina V. Swansen

## N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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If specialized accommodations for the disabled are needed, *e.g.*, sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074,



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TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.